86203-6

SUPREME COURT NO. ~~86203-9~~

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMAR MENEESE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, JUVENILE DIVISION

The Honorable Julia Garrett, Commissioner
The Honorable Ronald Kessler, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED

There exist only a few narrowly drawn and jealously guarded exceptions to the warrant requirement under the Fourth Amendment and Washington Constitution article I, section 7. One is the "school search" exception, which allows a "school official" to search a student if there are "reasonable grounds" to believe the search is necessary to maintain school discipline and order. In this context, the issues presented are:

1. Whether a police officer assigned as a resource officer to a public school qualifies as a "school official" for purposes of searching a student's locked backpack under the "school search" exception when the student has already been arrested and handcuffed by the officer and no longer has access to the backpack.

2. Whether a "school official" lacks "reasonable grounds" to conduct a warrantless search of a student's locked backpack when the student: (a) is already arrested and handcuffed; (b) has no access to the backpack; (c) the backpack is in police custody; and (d) where an immediate search of the backpack is not necessary to maintain school discipline and order.

B. STATEMENT OF THE CASE

The Bellevue School District pays the Bellevue Police Department to have officers assigned to it schools as "School Resource Officers"

(SRO). RP 39. Officer Michael Fry was the SRO assigned to Robinswood High School and Middle School (Robinswood). RP 36. As Robinswood's SRO, Officer Fry was available to respond to off-campus police matters, but his main duties were to maintain school safety, be available to students with questions or concerns, and to provide a positive police presence. RP 37, 39.

One day Officer Fry saw petitioner Jamar Meneese in a bathroom holding what appeared to be a bag of marijuana and a medicine vial. RP 44-45, 66. Officer Fry seized Meneese, the suspected marijuana and vial, and Meneese's backpack and took them the Dean of Students, Phyllis Roderick. RP 45-47, 68-70. After informing Roderick what he had seen Meneese doing in the bathroom, he informed Meneese he was under arrest and called for an officer to transport Meneese to the precinct for booking. RP 48-50, 71-72.

At some point Officer Fry noticed the zipper to the main compartment of Meneese's backpack was locked. He could not smell marijuana in the pack, but suspected there might be some in it anyway. RP 49, 74, 78-79. Without Meenese's permission, Officer Fry forced open the zipper enough to get his hand inside. RP 50-53. When he asked Meneese for the key, Meneese said he left it at home. RP 53. Officer Fry then handcuffed Meneese, searched him, and found the key to the lock in

Meneese's jacket. RP 53-54. Officer Fry undid the lock, opened the backpack, and discovered an air pistol, which was used to convict Meneese's of the gross misdemeanor offense of "Possessing dangerous weapons on school facilities."[1] CP 5-7, 25; RP 54; RCW 9.41.280.

The transport officer arrived sometime after discovery of the pistol. RP 30. Fry advised Meneese of his rights before he was transported to the precinct for booking. RP 31, 56-57.

C. ARGUMENT

THE SEARCH OF THE BACKPACK WAS NOT LAWFUL UNDER THE "SCHOOL SEARCH" EXCEPTION BECAUSE OFFICER FRY WAS NOT A "SCHOOL OFFICIAL" AT THE TIME OF THE SEARCH AND BECAUSE THERE WAS NO BASIS TO BELIEVE THE SEARCH WAS NECESSARY TO MAINTAIN SCHOOL DISCIPLINE AND ORDER.

The Fourth Amendment to the U.S. Constitution and article I, section 7 of the Washington Constitution protect people from unreasonable searches and seizures and invasions of privacy. In some circumstances, article I, section 7 provides greater protection than its federal counterpart. See e.g., York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008) (random drug testing of student athletes violates article I, section 7, but not Fourth Amendment).

[1] Meneese was also convicted of misdemeanor possession of marijuana. CP 24.

Only a valid warrant and a few narrowly drawn and jealously guarded exceptions to the warrant requirement provide the authority of law required by article I, section 7. State v. Williams, 171 Wn.2d 474, 485, 251 P.3d 877 (2011); State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Under both constitutions, the burden is on the State to prove an applicable exception when a search is conducted without a warrant. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Where the State fails to prove an applicable exception, any evidence seized or derived from the search must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

In the school context, Washington courts have upheld warrantless searches of students and their belongings when conducted by a school official and based on reasonable individualized suspicion. York, 163 Wn.2d at 308–09. This exception to the warrant requirement is premised on the unique nature of the school environment, which this Court recognizes requires that school officials be able to respond swiftly in certain circumstances to maintain order, discipline and an environment conducive to learning. State v. McKinnon, 88 Wn.2d 75, 81, 558 P.2d 781 (1977).

Here, the State relied on the "school search" exception with regard to Officer Fry's warrantless search of Meneese's backpack. RP 108-113. It

does not dispute that absent application of this exception, the search was unlawful. State v. J.M., 162 Wn. App. 27, 33 n.4, 255 P.3d 828 (2011).

A careful reading of the decisions that initially formulated the school search exception reveals the primary impetus was the need for school officials to respond swiftly to circumstances that threaten to immediately jeopardize the safety of students and the efficacy of the educational process.[2] For example, in McKinnon, the first case in Washington to recognize and apply the exception, this Court reasoned:

> Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order. The factors to be judged in determining whether the school official had reasonable grounds are the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.

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[2] See 5 Wayne R. LaFave, Search & Seizure § 10.11(b) at 492-93 (4th ed. 2004) ("school searches . . . are directed to a rather special public concern--maintenance of a proper educational environment--which is deserving of a high degree of protection.").

McKinnon, 88 Wn.2d at 81. (citations omitted, emphasis added); see also Kuehn v. Renton School Dist. No. 403, 103 Wn.2d 594, 598, 694 P.2d 1078 (1985) (noting that the school search exception to the warrant requirement stems from "the need for immediate action on the part of the school official" to respond to disciplinary matters). Although McKinnon provides a list of factors[3] to consider in assessing whether the exception is applicable, the primary foundation for creating the exception is "the exigency to make the search without delay[.]" 88 Wn.2d at 81.

Similarly, in New Jersey v. T.L.O., 469 U.S. 325, 340, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), the Court recognized a tension exists between a student's "legitimate expectations of privacy" and a school's "need to maintain an environment in which learning can take place[.]" In balancing these competing interests in the context of the Fourth Amendment, Justice White's lead opinion reasons:

> It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would

[3] These factors include "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." McKinnon, 88 Wn.2d at 81.

> unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," Camara v. Municipal Court, 387 U.S. [523, 532-33, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)], we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

469 U.S. at 340 (emphasis added). The concurring and dissenting opinions similarly recognized the need for school officials to respond swiftly to disciplinary matters makes the warrant requirement impractical. T.L.O., 469 U.S. at 352-53 (Blackmun, J., concurring); 469 U.S. at 356 (Brennan, J., concurring in part, dissenting in part); 469 U.S. at 376 (Stevens, J., concurring in part, dissenting in part). Thus, just like this Court in McKinnon, the Court in T.L.O. recognized the existence of exigent circumstances as being at the heart of the need for a school search exception to the warrant requirement.

Here, as the court of appeals correctly noted, by the time Officer Fry searched Meneese's backpack there were no exigent circumstances. J.M., 162 Wn. App. at 38-39. Meneese was under arrest and handcuffed in preparation for transport to the police precinct for booking. He had no access to the backpack. CP 27. There was no evidence to support a finding there was a need to immediately search the backpack. 162 Wn. App. at 38.

Unfortunately, the court of appeals failed to fully appreciate the narrowly drawn foundational basis for the school search exception. Instead, it applied the McKinnon factors in rote fashion to conclude the exception applies as long as some of them are satisfied. 162 Wn. App. at 37-39. This was error for at least a couple of reasons.

First, Officer Fry was not a "school official" at the time he conducted the search. Officer Fry's job, unlike that of a school principal includes the prevention and discovery of crime, in addition to helping maintain a safe learning environment at the school. RP 39-42; see McKinnon, 88 Wn.2d at 81 (school administrators not concerned with "the discovery and prevention of crime.").

Under McKinnon, Officer Fry was not a "school official." Instead, he was a police officer acting within police authority when he arrested Meneese for committing a misdemeanor offense (possession of less than 40 grams of marijuana) in the school bathroom and therefore should have followed proper law enforcement procedure and obtained a search warrant before searching the locked backpack. See RP 73 (Officer Fry agrees that only law enforcement officers may arrest a person for a misdemeanor).

Even if Officer Fry was acting as a "school official" during his initial contact with Meneese, by the time he searched Meneese's backpack he had shifted roles. By the time of the search, Officer Fry had already formally

arrested Meneese and made arrangements to transport him to jail. Thus, he had completed his duties as an SRO of maintaining Robinswood as a "safe, secure and orderly learning environment" by effectively removing Meneese from any interaction with other students or faculty. Officer Fry then transitioned to a purely law enforcement function when he searched the backpack because he was then focuses exclusively on the discovery of crimes.

The court of appeals failed to appreciate this distinction in Officer Fry's interactions with Meneese. Instead, it concluded that because Officer Fry's "primary duties as an SRO were to maintain a safe, secure, and orderly learning environment," he qualified as a "school official" during his entire interaction with Meneese. 162 Wn. App. at 35. This was error.

Second, even if Officer Fry was a "school official" when he searched Meneese's backpack, he lacked a reasonable individualized suspicion that an immediate search of the backpack was necessary to maintain school discipline and order. The backpack was out of Meneese's control and in police custody, there was no indication it contained anything inherently dangerous such as explosives or toxic chemicals, and there was not basis to think any evidence it might contain would be lost if not immediately discovered. At the time of the search, there was simply no exigent need to

invade Meneese's privacy in the contents of his locked backpack absent a valid warrant. 162 Wn. App. at 38 n.9.

Officer Fry simply wanted to know what was in the pack because it was locked, which piqued his curiosity and made him suspect there might be more marijuana inside. But the need to satisfy curiosity is not a valid basis for the warrantless search of a student's locked backpack, whether by a police officer or a school official. As McKinnon and other cases hold, search of a student or his belongings is reasonable only if there is a reasonable concern of criminal conduct and there is an immediate need to determine whether those concerns are founded. See e.g., State v. B.A.S., 103 Wn. App. 549, 554-56, 13 P.3d 244 (2000) (search of student unconstitutional because there was no nexus between the search and violating the closed campus policy and no exigent circumstance warranting a search); cf. State v. Slattery, 56 Wn. App. 820, 825-26, 787 P.2d 932, (possibility that student or student's friend might remove car from campus was circumstance warranting immediate search of car for drugs by school security guards), review denied, 114 Wn.2d 1015(1990).

The circumstances did not justify a warrantless search of Meneese's backpack. The failure to obtain a warrant violated Meneese's constitutional privacy rights. In order to apply the school search exception here, the court of appeals had to dislodge it from its narrowly drawn and closely guarded

foundational underpinnings expressed by this Court in McKinnon and the United States Supreme Court in T.L.O.

The court of appeals published decision erodes the constitutional right of students to be free from unreasonable searches of their person and belongings by state agents. By holding Officer Fry was acting as a "school official" and had "reasonable grounds" to search Meneese's backpack, the decision wrongly broadens the scope of the "school search" exception beyond its intended purpose, which is to allow swift action in the face of reasonably perceived threats to school discipline and order. Such broadening is counter to the well-established principle that there should be few exceptions to the warrant requirement, and the exceptions that do exist should be closely and jealously guarded against over extension. State v. Schultz, 170 Wn.2d 746, 761, 248 P.3d 484 (2011); State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

D. CONCLUSION

This Court reverse the court of appeals decision, reverse Meneese's conviction for possessing a weapon at school, and reverse the order denying Meneese's motion to suppress the evidence recovered from the unlawful search of his backpack.

DATED this 21st day of November 2011.

Respectfully submitted,

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